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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

NO. 91-6516 (3)

EDWARD SOLDAL, et al.,

Plaintiff-Petitioner

vs.

COUNTY OF COOK, et al.,

Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI

RESPONDENTS' BRIEF IN OPPOSITION

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EDWARD SOLDAL, et al.,	)	
	)	
Plaintiff-Petitioner,	)	
	)	
vs.	)	No. 91-6516
	)	
COUNTY OF COOK, et al.,	)	
	)	
Defendant-Respondents.	)	

NOTICE OF FILING

TO: JOHN L. STAINTHORP
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PLEASE TAKE NOTICE that on February 11, 1992, I mailed for filing with the Clerk of the Court for the United States Supreme Court the Respondent's Brief In Opposition to the Petition for Writ of Certiorari, a copy of which is attached and served upon you by placing it in the United States mail at 500 Richard J. Daley Center, Chicago, Illinois 60602, postage prepaid on February 11, 1992.

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Subscribed and Sworn to
before me this 11th day
of February, 1992.

_____
Notary Public

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS.	i
TABLE OF AUTHORITIES	ii
FACTS.	1
REASONS FOR DENYING THE WRIT:	
I. THE FOURTH AMENDMENT DOES NOT APPLY TO THE CASE.	3
II. THE OFFICERS' ACTS WERE NOT UNREASONABLE	12
III. THERE WAS NO SUBSTANTIVE DUE PROCESS VIOLATION.	15
IV. THERE WAS NO STATE ACTION.	15
CONCLUSION.	17

TABLE OF AUTHORITIES

CASES

	PAGE
C.A.B. v. United Airlines, 542 F.2d 394 (7th Cir. 1976)	8
Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1966)	7
Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264 (7th Cir. 1979)	8
Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194 (1984)	4-6, 9-11
Katz v. United States, 389 U.S. 349, 88 S.Ct. 507 (1967)	3-5
Marshall v. Barlow's Inc., 436 U.S. 307, 98 S.Ct. 1816 (1978)	7
Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942 (1978)	7
Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961)	9
National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384 (1989)	7
New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985)	7
O'Connor v. Ortega, 480 U.S. 709, 107 S.Ct. 1492 (1987)	7
Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564 (1928)	4
Pfeil v. Rogers, 757 F.2d 850 (7th Cir. 1985)	8
Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981)	10-11
Skinner v. Railway Labor Executive's Assoc., 489 U.S. 602, 109 S.Ct. 1042 (1989)	7

United States v. Place, 462 U.S. 696, 103 S.Ct. 2637 (1967)	6,8
United States v. Nasser, 476 F.2d 1111 (7th Cir. 1973)	7
United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029 (1970)	5,6
Zinermon v. Burch, ___ U.S. ___, 110 S.Ct. 975 (1990)	9-11

STATEMENT OF FACTS

Although the facts as stated by the petitioner are essentially correct, there are several points that should be clarified. Contrary to the petitioner's assertions that the trailer park management "expected" that the plaintiff might try to resist the eviction, they only feared that a disturbance might occur. (R.56, Attachment C.) The Cook County Sheriff's Office dispatched an officer (Shawn O'Neill) to "standby to maintain peace" (R.56, Attachment C) rather than "agree(ing)...to ensure the moving of the mobile home was accomplished without any incidents". (Petitioner's brief p.5) Officer O'Neill was dispatched to maintain the peace should the need arise not, as the petitioner asserts, to assist in the eviction of the petitioner.

At the time that the petitioner came out of his house, Officer O'Neill was sitting in his squad car (R.56, Attachment E p.15) and he did not get out of it until he saw the petitioner approach the trailer park workers. The officer did not speak to the trailer park workers when they arrived at the trailer site. (R.56, Attachment E p.15) When asked by the petitioner what he was going to do about what the workers were doing, Officer O'Neill is alleged to have said that he was there to see that the plaintiff did not interfere with the workers.

There is nothing in the record to suggest that Officer O'Neill knew that the eviction was illegal at the time that he was dispatched, while at the trailer site or later. The report of Lieutenant Jones (R.56, Attachment C) clearly states that after Officer O'Neill arrived he determined that an eviction was taking place. At some point in time after Officer O'Neill arrived Lieutenant Jones came to the trailer park and asked the park manager if she had court approval for the eviction. Lieutenant Jones was told that indeed they did but when he checked for the notice, he found that there was none. Lieutenant Jones told the manager that a notice was required. Lieutenant Jones then contacted his office and had the court file checked and determined that the next court date was September 22, 1987, some 18 days later. (R.56, Attachment C)

While all of the foregoing was occurring the workers were preparing to remove the trailer from the lot. At approximately 1430 hours (2:30 p.m.) the petitioner came to the trailer park office, this being approximately one hour after Officer O'Neill had been dispatched.[1] The petitioner advised Lieutenant Jones that his attorney had told him to sign a criminal complaint against the park manager for criminal trespass to land. Lieutenant Jones contacted the Cook County State's Attorney's Office and spoke to an assistant state's attorney regarding the petitioner's request. Lieutenant Jones was advised by Assistant State's Attorney Crowley that in his opinion the elements were not present for the offense. Based upon that legal advice, Lieutenant Jones told the plaintiff that he would not take his complaint. (R.56, Attachment C)

Lieutenant Jones told the park manager that they would not be allowed to leave the trailer on the street after being told that

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[1] The time of the occurrence is noted as 1330 hours or 1:30 p.m. in Lieutenant Jones' report.

that is what they intended to do. Lieutenant Jones was also told that the park management had arranged for a place for the plaintiff and his family to stay, including all of his children for four nights. (R.56, Attachment C)

There is no evidence in the record that any of the Cook County Sheriff's Police Officers had any knowledge that the park manager had not complied with the Illinois Forcible Entry and Detainer statute in her eviction of the petitioner until some time after the workers were in the process of removing the trailer.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.
THE FOURTH AMENDMENT DOES NOT APPLY TO THIS CASE

"The Fourth Amendment protects people, not places."

Katz v. U.S., 389 U.S. 349, 351, 88 S.Ct. 507, 511 (1967).

The appellate court below accepted that statement, ruling in part, that the touchstone of the Fourth Amendment is the protection of an individual's privacy and there was no violation of that privacy in this case. The incident involved was a garden variety landlord/tenant dispute which involved a trailer lot. The petitioner asserts that the relocation of his trailer from this lot by the private parties (the trailer park manager and employees) violated the Fourth Amendment's prohibition against unreasonable seizures. Although no evidence of a conspiracy was found by the District Court, the petitioner claims that there was one between

the trailer park personnel, specifically the manager, and all of the Sheriff's Police defendants, thus satisfying the requisite state action requirement. Petitioner's allegations are misplaced.

In Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564 (1928), this Court found that there was no Fourth Amendment violation in the overhearing of conversations taking place inside a telephone booth. A key point in the decision was that there had been no physical intrusion. However, the notion that a "trespass" was required was later rejected in Katz, supra. Katz overruled Olmstead by focusing on the privacy of the individual as the touchstone the Fourth Amendment sought to protect. "But, what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Katz, 389 U.S. at 351, 88 S.Ct. at 511. Because Katz's privacy was intruded upon, the Fourth Amendment was implicated and its mandates must be met before the "search" for and "seizure" of his conversation would be constitutional.

In Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194 (1984) the first question the Court said it had to address was whether or not the prisoner had a right of privacy entitling him to Fourth Amendment protection from an allegedly unreasonable search and seizure.

> The applicability of the Fourth Amendment turns on whether "the person invoking its protection can claim a 'justifiable', a 'reasonable', or a 'legitimate expectation of privacy' that has been invaded by government action." Id., 468 U.S. at 525, 104 S.Ct. at 3199.

The Hudson Court concluded that a prisoner has no legitimate expectation of privacy and therefore the Fourth Amendment does not afford them any protection from warrantless searches. Had the Court stopped there, the case would have little applicability here. But Hudson further claimed that personal, noncontraband property was seized and destroyed. The Court held that the same reasoning used with respect to the search issue applied with respect to the seizure issue.

> Assuming that the Fourth Amendment protects against the destruction of property, in addition to its mere seizure, the same reasons . . . apply with controlling force to seizures. . . . The Fourth Amendment does not protect against seizures in a prison cell . . . Id., 468 U.S. at 528, 104 S.Ct. at 3201 n.8. (emphasis added)

Since it was the privacy of the individual that decided the issue of whether or not there could be a Fourth Amendment seizure, then it must logically flow that it is privacy that the Fourth Amendment protects, not mere property. That, too, is what Katz held was protected, the individual's privacy.

In United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029 (1970), federal authorities detained two packages deposited in the United States mail while they conducted an investigation which led to a search warrant. Regarding the 29 hour "detention" of the packages to obtain the warrant, the Court said, in finding no Fourth Amendment violation, "The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the

magistrate was obtained." Id., 397 U.S. at 253, 90 S.Ct. at 1032. While limited to the facts of the case, Van Leeuwen reaffirms that it is the individual's privacy that the Fourth Amendment seeks to protect. In the petitioner's case, the "envelope" was moved but never opened.

With respect to the case at hand, the privacy right of the petitioner was never implicated. The trailer was never entered or searched. The trailer was relocated to a safe place, assumedly at the trailer park's expense, and lodging provided for them for some period of time. While not minimizing the inconvenience caused them, their trailer was not searched nor any of the contents taken. They had access to it and the contents. Their freedom to move about was not impaired although admittedly their ability to live in the trailer was hampered until it could be reconnected to utility service. If a classic Fourth Amendment seizure where destruction of property occurs is only actionable in state court (as in Hudson) why then is the same state court remedy in a relocation of property without destruction so repugnant to the petitioner? If, as the petitioner argues, the Fourth Amendment should apply to his situation should not a prisoner be entitled to equal protection from the intentional, wanton destruction of personal, non-contraband property?

Petitioner cites United States v. Place, 462 U.S. 696, 103 S.Ct. 2637 (1967) to support his position that the Fourth Amendment applies; however, that case is different in two respects. First, it is a pure law enforcement case. While the Fourth Amendment is

not limited only to law enforcement situations, there is invariably some law enforcement nexus in the cases cited by the petitioner.

For example, in Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1966), a government inspector sought unconsented access into a person's dwelling to enforce housing code violations. In Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942 (1978) government agents (police and fire) made unconsented entries onto private property to conduct an arson investigation. Government agents sought unconsented entry into a business to look for OSHA violations in Marshall v. Barlow's Inc., 436 U.S. 307, 98 S.Ct. 1816 (1978). A school principal in New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985) made an unconsented search of a student's purse to enforce a school rule. In O'Connor v. Ortega, 480 U.S. 709, 107 S.Ct. 1492 (1987) government agents searched the office of an employee on administrative leave in furtherance of an internal investigation. Agents acting on behalf of the government conducted "searches" of railroad employees to detect the presence of alcohol or drugs in Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602, 109 S.Ct. 1042 (1989). In other "non-law enforcement" cases the same nexus exists. Government agents sought the testing of employees for drugs in their urine for enforcement of employment rules in National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384 (1989). In United States v. Nasser, 476 F.2d 1111 (7th Cir. 1973) an IRS attorney was the subject of an internal investigation including video surveillance and phone taps. Government agents sought unfettered access to company books to

enforce federal regulations in C.A.B. v. United Airlines, 542 F.2d 394 (7th Cir. 1976). In Pfeil v. Rogers, 757 F.2d 850 (7th Cir. 1985) police officers made a warrantless entry onto private land because of a disturbance caused by a dog. Finally, in Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264 (7th Cir. 1979), cert. denied, 429 U.S. 1029 (1979) a government agency required certain employees to submit to tests for drugs or alcohol after an accident.

All of these cases have the following elements in common:

1. Direct action against the individual or company by a government agent at the behest of the government;

2. Invasion of personal or company privacy by the government agents; and,

3. The government action was for the purpose of enforcing some type of governmental law, rule or regulation.

In contrast to the above cases, the situation involving the petitioner was purely civil in nature. It was a property dispute between private parties. The trailer park felt they had a right to regain access to the trailer lot and the petitioner disagreed. The trailer park manager moved the trailer to gain access to the lot not to seize and maintain any control over the trailer, nor to enforce any governmental rule, regulation, ordinance or statute.

The second point of departure from Place, supra., is the nature of the seizure. The Place seizure was not a seizure for the purpose of moving something aside. The government agents wanted to invade the privacy of the person by searching the suitcase. They

obtained control of it and kept it from the owner for several days while waiting to obtain a search warrant. However, in the petitioner's case the trailer park employees had no interest in the trailer or its contents. The employees did not want to exert control over the trailer in order to later search it. They wanted their lot and to get it they had to move the trailer. The trailer was not impounded or held pending the payment of towing fees or until the resolution of a lawsuit. The petitioner had his possession interrupted for a few hours while the trailer was disconnected. Once removed from the trailer park, the petitioner had the freedom to do whatever he wished with it. As the en banc opinion states, ". . . not every interference with exclusive dominion and control over one's property is a seizure in the relevant sense because not every such interference compromises privacy." 942 F.2d at 1078. Such was the case here.

The petitioner scoffs at the notion that the existence of other remedies should act as a bar to a Fourth Amendment claim. He cites Zinermon v. Burch, ___ U.S. ___, 110 S.Ct. 975 (1990) yet the portion quoted clearly states that overlapping state remedies are generally irrelevant to the question of a cause of action under §1983. (Petitioner's brief, p.15) The Court in Zinermon did not say they are never relevant. See for example Hudson, supra. at note 8. As the Zinermon Court explained, its holding in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961) was aimed at inadequate state laws or situations where there was a state remedy in theory but not in practice. "As was noted in Monroe, in many cases there

is 'no quarrel with the state law on the books,' (citation omitted). Instead, the problem is the way these laws are or are not implemented by state officials." Zinermon, supra. at 983. The petitioner has never asserted that he does not have a complete and full remedy available to him under state law to redress the moving of his trailer.

Nor does the petitioner's claim that a liberty interest has been infringed preclude the adequacy of post-deprivation remedies. The Court was confronted with that challenge in Zinermon and rejected a categorical distinction between liberty and property interests. "Thus, the fact that a deprivation of liberty is involved in this case does not automatically preclude application of the Parratt rule." Zinermon, supra. at 987. Whether considered as property or liberty, the analysis is essentially the same. The State has created a statutory scheme for evictions which includes notice and a hearing. It also provides adequate state law remedies should those procedures not be followed. Assuming, arguendo, there was state action, the random unauthorized errors of the officials here could not have been foreseen or prevented. The adequacy of a post-deprivation remedy following Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981) is sufficient.

As the en banc opinion noted, to make sense out of Hudson's conclusion with respect to the seizure of the inmate's property, that same conclusion needs to be made here. In Hudson it was the privacy that linked the Fourth Amendment to the property. No violations of privacy, no Fourth Amendment violation in the seizure

of that property. In fact, no privacy, no Fourth Amendment. That same dichotomy has arisen in this case and the en banc majority, following the Court's conclusion in Hudson, ruled that the Fourth Amendment did not apply.

As the en banc opinion suggests, to be able to recast evictions, repossessions and the like as Fourth Amendment cases would effectively nullify and render useless the line of cases from Parratt to Zinermon. It is difficult to conceive of any due process property deprivation that would not be a "seizure" under the broad reading given that term in the Fourth Amendment. Engaging in the Parratt/Zinermon analysis would become unnecessary. Imagine how far reaching such a concept would be. See for example Judge Easterbrook's concurring opinion, 942 F.2d at 1081.

Judge Posner questions whether the Fourth Amendment was ever meant to reach non-law enforcement activities. 942 F.2d at 1076 The Amendment's warrant clause seems to indicate that it contemplated a law enforcement context as does the use of the terms "search" and "seizure". Those words are usually applied to government activities related to law enforcement. To handle non-law enforcement situations, the civil disputes if you will, the Fourteenth Amendment was adopted with distinctively different wording, ". . . nor shall any State deprive any person of life, liberty or property without due process of law . . . ." There must be some reason why two amendments which cover the same subject matter have such vastly different wording. A plausible explanation is that the Fourth Amendment was meant to protect against

government enforcement of rules, regulations and laws while the Fourteenth Amendment was meant to protect persons and property in a non-law enforcement context from arbitrary action by the States through their statutes and regulations. It is this Court that has to decide that issue. However, finding that the Fourth Amendment does not apply to this civil action does not diminish the protections afforded the petitioner; such a conclusion merely says the remedy for the wrong is in a state court, not federal.

Therefore, this is not a situation where the petitioner is being left without a remedy. The question is what remedy should he have. The petitioner is attempting to turn a routine property dispute into a federal case. It is not that he is without a remedy, its that he prefers a different remedy with potentially deeper pockets, and the prospect of awarded fees. Housing courts and State civil courts are meant for these type of cases, especially where there is no challenge to the adequacy of the statutory scheme but to a private party's failure to follow that scheme.

II.
THE OFFICERS' ACTIONS WERE NOT UNREASONABLE

Assuming, arguendo, there was state action, the officers' actions were reasonable. While it is true that no judicial order had issued, from the standpoint of the officers' conduct, (and isn't it their conduct that is at issue), their actions were not unreasonable. The Sheriff's Office received a routine request for assistance regarding the moving of a trailer. After Officer

O'Neill arrives he determines that an eviction is planned. Lieutenant Jones responds and questions the park manager about court approval and is told that they have such approval. Lieutenant Jones then checks for a notice and discovers that there isn't one. Further, he orders the court file checked and is informed that the next court date is approximately 18 days later.

After the foregoing has occurred, the petitioner appears and wants to sign a criminal trespass to property complaint. Lieutenant Jones then contacts the local prosecuting authority and is told by Assistant State's Attorney Crowley that the elements for that crime were not present. Lieutenant Jones, based upon the conversation with ASA Crowley, tells the petitioner that he will not take his complaint.

The police in this case have been placed in a "trick bag". They respond to a routine request for assistance in a civil dispute between private parties. Although the civil suit had not been settled there is no question that a dispute over who is entitled to possession of the trailer lot has occurred. One side has said they have a right to get it back and the other says they have the right to remain in possession. The police respond and do nothing but sit at the trailer site. Officer O'Neill does not physically intervene or threaten to arrest the petitioner if he does anything. Going beyond their duty, Lieutenant Jones checks to see if proper procedures have been followed. Subsequent to finding that they were not, he further finds that the local prosecutor says that no crime has occurred. In hindsight it would have been better for the

police to immediately leave the scene upon discovering there was no court order, abandoning their role as keeper of the peace, and return only if that peace was shattered.

Lieutenant Jones finds himself at the scene of a civil dispute with no crime. He is a law enforcement officer who has the authority to stop illegal criminal activity, of which there is none.[2] While moving the trailer without judicial approval is illegal, it is not a criminal offense. Lieutenant Jones, Officer O'Neill and the entire Sheriff's Office did not have any legal authority to order that the trailer be restored to its original state. An emergency Temporary Restraining Order, never sought by the petitioner, issued by a court could, but not the police.

The petitioner would prefer that the analysis of the situation be simplified; that because no judicial order was issued, an unreasonable seizure under the Fourth Amendment occurred. The petitioner takes too broad a step in making that conclusion. The determination of reasonableness is always fact driven. Given the perhaps unique circumstances, the officers acted reasonably and found themselves in a situation where, after legal consultation, they had no authority to take action.

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[2] "But the Sheriff's police . . . were under an opposite duty not to intervene on either side unless some infringement of the criminal code was committed . . . ." panel opinion (923 F.2d at 1245) quoting the District Court opinion.

III.
THERE WAS NO SUBSTANTIVE DUE PROCESS VIOLATION

The petitioner claims there was a violation of his substantive due process rights because "the deputy sheriffs partially destroyed their home." (Petitioner's Brief, p.25) First, no deputy sheriff ever touched or participated in moving the trailer. That was accomplished solely by employees of the trailer park. Secondly, there is no evidence to sustain the allegation that the trailer was partially destroyed. The hyperbole aside, the petitioner says that the trailer's skirting and canopy had been removed in order to remove the trailer and that in the course of moving the trailer some personal items were broken and a heater jarred loose. (R.56, Attachment E, pp.27 and 52) This is a far cry from wanton destruction for its own sake. Rather, it flowed from and was a natural consequence of moving the trailer. Common sense says that the trailer could not be moved without the skirting or canopy being removed. If some incidental damage was done, it is unfortunate, but far from wanton destruction. The consequential damage was part of the removal of the trailer and does not constitute a separate constitutional violation.

IV.
THERE WAS NO STATE ACTION

The original panel decision (923 F.2d 1241) discussed but never totally resolved the state action issue. The panel majority concluded, in spite of clear evidence to the contrary, that the failure of Officer O'Neill to take action against the trailer park

employees was effectively "preventing" the petitioner from exercising his statutory right to self-help. (923 F.2d 1247)[3] That, however, was not determinative in that the petitioner had charged a conspiracy so the question became whether there was one. That decision was never reached by the panel because the majority concluded it did not make any difference. "All this is terribly speculative, though, and in the end quite irrelevant. . . . Either way, the plaintiffs could not, at least as they have framed the case, obtain damages for the deprivation." 923 F.2d at 1248. The en banc decision however states:

> The deputy sheriffs prevented Soldal from exercising his right [to self-help], and while this by itself may not have made them actual participants in the eviction, the condition of the record (the case was dismissed on summary judgment) requires us, as the panel opinion explained, to assume that there was a conspiracy between the private and public defendants - that the deputy sheriffs joined Terrace Properties in a scheme to get rid of a pesky tenant, a troublemaker. 923 F.2d at 1247-48 at 942 F.2d 1075.

Yet, as previously noted, the panel opinion did not conclude that there was a conspiracy. If, as the respondents contend, their actions did not make them participants (which the en banc opinion

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[3] Lieutenant Jones' report unequivocally states that he talked to Assistant State's Attorney Dana Crowley about arresting the trailer park people for criminal trespass and was informed that the elements were not present. Curiously, the panel majority would have the police substitute their legal knowledge for the prosecutor's and failing to do so makes them active participants.

suggests is correct) and, as District Court Judge Kocoras found, there wasn't a conspiracy, then there was no basis for the court to consider the claim against the police respondents.

CONCLUSION

For all of the foregoing reasons, these respondents respectfully request that the Petition For Writ of Certiorari be denied.

Respectfully submitted,

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